U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-, INC.

DATE: SEPT. 1, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software development business, seeks to employ the Beneficiary as a software engineering project manager. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigration classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1152(b)(2). This "EB-2" classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner had the ability to pay the proffered wage to the Beneficiary.

On appeal, the Petitioner asserts that it has the ability to pay the proffered wage when considering the totality of the circumstances. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the DOL.[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national applies for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date."

II. ANALYSIS

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The issue before us is whether the Petitioner has the continuing ability to pay the proffered wage to the Beneficiary from the August 25, 2015, priority date onward.

In determining a petitioner's ability to pay the proffered wage at issue during a given period, we first examine whether it employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered proof of the petitioner's ability to pay the proffered wage.

If the petitioner has not paid the full proffered wage each year, we will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, we may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

The Beneficiary's proffered wage is $92,019 per year. The record indicates that the Petitioner is a C corporation and filed its tax returns on IRS Form 1120, U.S. Corporation Income Tax Return. Net income is shown on line 28 of the Form 1120. In this case, the Petitioner's tax return for 2015 states net income of -$52,481, which does not establish the Petitioner's ability to pay the proffered wage.

Next, we find that the Petitioner has not established that it has sufficient net current assets to pay the proffered wage to the Beneficiary. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d) and include cash-on-hand, inventories, and receivables expected to be

[2] According to *Barron's Dictionary of Accounting Terms* 117 (3d ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

converted to cash within one year. Its year-end current liabilities are shown on lines 15(d) through 17(d). The Petitioner's 2015 tax returns state net current assets of $46,983, which is insufficient to pay the proffered wage. Therefore, the Petitioner's net income and net current assets do not establish its ability to pay the proffered wage to the Beneficiary from the priority date onward.

USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the ability to pay the proffered wage. *See Sonegawa,* 12 I&N Dec. 612. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In this case, the Form I-140 states that the Petitioner was established in 2002 and that it has two employees. The record contains the Petitioner's tax returns for 2012, 2013, 2014, and 2015, which state the following amounts of net income, net current assets, gross receipts, wages paid, and consulting fees.[3]

Year	Net Income	Net Current Assets	Gross Receipts	Salaries and Wages	Consulting Fees
2012	$21,355	$7,106	$685,718	$68,500	$381,484
2013	$76,273	$82,536	$748,490	$91,300	$303,555
2014	$23,863	$105,450	$860,723	$50,960	$421,451
2015	-$52,481	$46,983	$694,366	$15,820	$460,067

These figures indicate that from 2013 through 2014 and from 2014 through 2015, the Petitioner's net income decreased in each year by over $50,000. The Petitioner's net current assets and gross receipts increased from 2012 through 2014; however, from 2014 to 2015, net current assets and gross receipts decreased by $58,467 and $166,357, respectively. The Petitioner has not provided any evidence that would establish the occurrence of uncharacteristic business expenses in 2015. We also note that the salaries and wages paid by the Petitioner have decreased by over $35,000 in each year from 2013 through 2015.

On appeal, the Petitioner states that it has the ability to pay the Beneficiary's proffered wage because it would experience an immediate reduction in its expenditures for contract labor. While the tax returns state amounts paid in consulting fees, the record does not contain sufficient evidence to demonstrate the wages paid to these consultants, the positions they currently hold, their initial job offer letters or employment contracts, or how the Beneficiary would replace any these consultants by performing the specific job duties that one or more of them currently performs.

[3] The tax returns for 2012 through 2014 precede the priority date, but we view them here, together with the Petitioner's 2015 tax return, in the totality of the circumstances.

The Petitioner also states that it has sufficient liquidity to pay the proffered wage as shown by its corporate bank statements, including those of its sole shareholder. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the Petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise provides an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return(s), such as the petitioner's taxable income (income minus deductions) or the cash specified on Schedule L that was addressed above in determining the petitioner's net current assets. Therefore, we will not consider the Petitioner's bank statements toward the ability to pay analysis.

In addition, we will not consider the personal bank statements of the Petitioner's sole shareholder because he does not personally have a legal obligation to demonstrate his ability to pay the proffered wage. Under 8 C.F.R. § 204.5(g)(2), the *Petitioner* must demonstrate its own ability to pay the proffered wage. *See Sitar v. Ashcroft*, 2003 WL 22203713 (D. Mass. Sept 18, 2003) (finding "that nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage"). Therefore, the Petitioner has not established its ability to pay the proffered wage in the totality of the circumstances.

For these reasons, considering the totality of the circumstances, we conclude that the Petitioner has not established its ability to pay the proffered wage to the Beneficiary from the priority date of the visa petition.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wage from the priority date onward.

ORDER: The appeal is dismissed.

Cite as *Matter of P-, Inc.*, ID# 671004 (AAO Sept. 1, 2017)